

No. 16,295

In the

United States Court of Appeals

For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
on Behalf of
TODD SHIPYARDS CORPORATION,
Claimant-Appellant

McCUTCHEEN, DOYLE, BROWN &
ENERSEN

RUSSELL A. MACKEY

BRYANT K. ZIMMERMAN

1500 Balfour Building
San Francisco 4, California

CROWELL, ROUSE & VARIAN

111 Broadway
New York 6, New York

*Proctors for Todd Shipyards
Corporation,
Claimant-Appellant*

FILED

FEB 12 1960

FRANK H. SCHMID, CLERK

In the
United States Court of Appeals
For the Ninth Circuit

TODD SHIPYARDS CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
on Behalf of
TODD SHIPYARDS CORPORATION,
Claimant-Appellant

*To: The Honorable William E. Orr and Oliver D. Hamlin,
Jr., Circuit Judges, and William J. Jameson, District
Judge:*

I.

INTRODUCTORY STATEMENT

This appeal by Todd Shipyards Corporation was from an order entered in the District Court denying a motion by Todd to (a) dismiss as to Todd the petition of the United

States, as "Owner" of the *S/T Trojan* (ex *Jeanny*), for limitation of liability against claims growing out of the explosions and fire which occurred on board the vessel on January 29, 1957, and (b) to vacate and dissolve as to Todd the order entered concurrently with the filing of the petition restraining and enjoining the further prosecution of pending suits against the Government.

At the time the disaster occurred, and also when the Government's petition was filed, the Government did not own the *Trojan* or the contaminated oil on board and had no relationship to either the vessel or the oil as owner. On the contrary, at the time of this accident it was a former owner-vendor, having sold and physically transferred its interest therein to Sheffield Tankers Corporation on December 26, 1956.

The District Judge held that the Government qualified "as owner" under the Acts of Congress limiting the liability of shipowners, *and that the asserted liability of the Government for negligent breach of a "Vendor's or Seller's warranty" with respect to the separate sale and delivery of bunker oil on board the vessel was a liability subject to limitation.*

II.

REASONS FOR REHEARING

At the argument of the appeal, counsel for the United States conceded for the first time that a vendor's liability is not subject to limitation under the Limitation of Liability statutes. Mr. Colby stated flatly and unequivocally that the limitation statutes have nothing to do with vendor's liability. The claim of Todd is based solely on the liability of the Government as vendor. Therefore, as matters now stand, it is conceded that Todd's claim is not subject to limitation.

Even if, as this Court has decided, there is a possibility of *other* claims being asserted which are subject to limitation, this cannot affect Todd's claim, which is not subject to limitation. This Court indicated in its opinion that the questions presented by Todd's motion to dismiss the Government's limitation petition could best be decided after hearing on the merits—but in view of the Government's concession, no such questions remain as to Todd's claim.

Todd's motion in the District Court (R. 105, 106) asked that the Restraining Order and Order Directing Issuance of Monition, dated and filed May 2, 1958, be vacated (R. 14). Since Todd's claim is not subject to limitation, it is entitled to that relief, even if the Government's petition for limitation is allowed to stand.

The need for an order of this Court directing that the Restraining Order be lifted is particularly clear, in view of the statement by Government counsel that a claim based on vendor's liability probably cannot even be *proved* in the Government's limitation proceeding. In other words, Todd cannot assert its claim against the Government unless the Restraining Order is lifted to permit Todd to prosecute its separate suits.

In denying Todd's motion below, the District Court indicated its view that a vendor's liability *was* subject to limitation—a view which the Government now concedes is not correct. (See Judge Wollenberg's opinion, R. 107-113, especially at the top of 112.) Under the circumstances, it is imperative that the order of this Court direct that the Restraining Order be lifted and that Todd be permitted to proceed with its separate suits based on vendor's liability.

III.

CONCLUSION

Appellant Todd Shipyards Corporation requests that a rehearing be granted or that the Court enter its order and judgment directing the District Court to dissolve, set aside and vacate the said Restraining Order, insofar as it affects Todd Shipyards Corporation.

Dated: February 12, 1960.

Respectfully submitted,

McCUTCHEEN, DOYLE, BROWN & ENERSEN
RUSSELL A. MACKEY
BRYANT K. ZIMMERMAN
CROWELL, ROUSE & VARIAN

*Proctors for Todd Shipyards
Corporation, Claimant-Appellant*

Certificate of Counsel

BRYANT K. ZIMMERMAN, of counsel for Todd Shipyards Corporation, petitioner, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and that the said Petition is not interposed for delay.

Dated: February 12, 1960.

BRYANT K. ZIMMERMAN